

Appeal from the decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-16278.

Set aside and remanded.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject the application for allotment.

2. Administrative Procedure: Generally -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

Where Bureau of Land Management determines that an application for a Native allotment is invalid because the facts are not as stated in the application, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.450-4.452-9.

APPEARANCES: John M. Holmes, Esq., Alaska Legal Services, Barrow, Alaska, and William Rives, Esq., Davis, Wright, Todd, Riese & Jones, Seattle, Washington, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE BURSKI

Amy Tukrook Nukapigak appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated August 8, 1975, rejecting her Native allotment application, F-16278. The application was filed pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and implementing regulations at 43 CFR Subpart 2561.

Appellant's application covers two parcels of land designated Parcel A and Parcel B. 1/ She alleges use and occupancy since 1929, primarily in the form of hunting and trapping. A house was also located on Parcel A.

Parcel A is included within lands withdrawn for national defense purposes by Public Land Order No. (PLO) 1571, dated December 26, 1957 (22 FR 54, Jan. 3, 1958), as amended, PLO 3780 (30 FR 10194, Aug. 10, 1965). Under present departmental policy, appellant's use and occupancy must have begun before the withdrawal for an allotment to be granted. 2/ BLM rejected Parcel A on the basis of statements which

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1/ Parcel A consists of the E 1/2, SE 1/4 of sec. 24, T. 11 N., R. 40 W., Umiat principal meridian. Parcel B consists of E 1/2, SE 1/4 of sec. 29, T. 1 S., R. 44 W., Umiat principal meridian.

2/ Secretarial guidelines of October 18, 1973, required that a Native must have initiated and completed substantial use and occupancy of the land for five years prior to a withdrawal or reservation and the Board had held to that effect in earlier decisions. E.g., Susie Ondola, 17 IBLA 359 (1974); Christian G. Anderson, 16 IBLA 56 (1974). However, Secretarial Order No. 3040 of May 25, 1979, abolished that 5-year requirement. The order stated in part:

"Sec. 3 Policy Decision. A. I have undertaken a review, with the Solicitor, of the five-year prior rule. I have approached the review from the premise that the Alaska Native Allotment Act was an act passed for the benefit of Natives and should, therefore, be liberally construed in favor of Natives. The Act itself does not contain the five-year prior rule as an express requirement. The policy appears to have originated as a result of the exercise of agency discretion. Since it was issued, however, the United States Court of Appeals for the Ninth Circuit has ruled, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that the range of the Department's discretion, in dealing with Native allotments is narrower than was previously supposed. Whether or not the five-year prior rule is a proper exercise of the Department's discretion, it is not consistent with my policy, that of liberally construing acts passed for the benefit of Natives.

"B. Accordingly, I hereby rescind the five-year prior rule in favor of a rule which merely requires that the full five years use and

appellant made to a field examiner indicating that she did not go on Parcel A until after she was married in 1958 or 1959 and therefore did not use or occupy the land prior to the withdrawal. BLM rejected Parcel B in part because there were no visible signs of use or occupancy. In addition, BLM notes that although appellant alleges occupancy since 1929, the Native enrollment records show that she was born on November 21, 1941. Finally, the field examiner reported that appellant told him that her husband had used the land but she had never accompanied him there.

The Native Allotment Act, supra, authorizes the Secretary of the Interior to allot to Alaska Natives not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral lands in Alaska for which the Alaska Native can show the required 5 years substantially continuous use and occupancy. 43 CFR 2561.0-3, 2561.2. Such use and occupancy

contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 CFR 2561.0-5(a).

Withdrawn lands are not open to appropriation under the Act. Elizabeth J. Martini, 42 IBLA 82 (1979); Serafina Anelon, 22 IBLA 104 (1975). However, pursuant to Secretarial Order No. 3040 of May 25, 1979, an applicant may be granted a Native allotment on withdrawn lands if all other requirements are met and the applicant either filed for the allotment or commenced the required use and occupancy prior to the withdrawal. Bella Noya, 42 IBLA 59 (1979).

[1, 2] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute in Native allotment cases, due process requires that

applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony

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fn. 2 (continued)

occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native allotment or commenced use and occupancy prior to a withdrawal of the land."

of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.450 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, reaffirmed on reconsideration 28 IBLA 153, 83 I.D. 564 (1976). The Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, *supra*. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

In this case, the statements of appellant reported by the field examiner and those made in her allotment application are contradictory. Although appellant filed no statement of reasons to support her appeal, 3/ we can not say on the face of the record before us that the material facts on which the BLM decision was based are undisputed. It is necessary, therefore, to set aside the BLM decision and remand the case to the Alaska State Office for initiation of contest proceedings. Having determined that the application is invalid because the facts are not as stated in the application, BLM must serve upon appellant a

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3/ Under 43 CFR 4.402, an appeal to this Board is subject to summary dismissal for failure to file a statement of reasons. However, in a letter dated September 24, 1975, to offices of the Alaska Legal Services Corporation, the Chief Administrative Judge, Interior Board of Land Appeals, enunciated a policy relaxing procedural requirements with respect to appeals by Alaska Natives from decisions rejecting their allotment applications. The letter stated in part:

"The Board will not consider any appeal relating to an Alaska Native allotment applicant until at least 60 days after the filing of the notice of appeal. The Board will accept and consider a statement of reasons in support of an appeal at any time before a decision is reached. No appeal by an Alaska Native will be dismissed summarily for failure to submit a statement of reasons in support of his appeal. Each case will be decided on the merits of its record before this Board." This policy was extended by the Order of November 27, 1976, IBLA 76-715. In State of Alaska, 42 IBLA 94 (1979), the relaxed procedures were revoked as to all future appeals. Since this case was pending before the Board at the time of revocation, the relaxed procedures still apply and the appeal is not subject to summary dismissal for failure to file a statement of reasons.

contest complaint which specifies the discrepancies on which the contest is based. Appellant will then have 30 days from receipt of the complaint within which to file an answer. If an answer is not timely filed, the allegations of the complaint will be taken as admitted and BLM may decide the case without a hearing. If an answer is filed leaving a disputed issue of material fact, BLM must forward the case record to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for a hearing. See 43 CFR 4.450-4.452-9; Donald Peters, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for action consistent with this opinion.

James L. Burski  
Administrative Judge

We concur

Frederick Fishman  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

